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ABSTRACT

Incidences of staff terminations under clouded circumstances are filled with legal and ethical dilemmas. The benefits of an informal process similar to "plea bargaining" are discussed. There is less emotional and financial toll for the accused employee, and school boards benefit as well in terms of the media, cumbersome disciplinary procedure, and the prospect of forcing third parties to testify. Discussed is the disturbing provision often written into termination agreements that prohibits the school system from disclosing the reasons behind the employee's departure from the district. The New York State School Boards Association policy services department developed a school employees termination policy that allows the school board to enter settlement negotiations on a sure footing. (SI)

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Updating SCHOOL BOARD POLICIES

Volume 20/Number 6/June 1989

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Ethical dilemma in staff terminations—avoided!

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One of the most troubling decisions facing a superintendent occurs when the person is called on to give a reference for a former employee who is leaving or has left the school system under clouded circumstances (i.e., without a formal determination of guilt or innocence). Such incidents are filled with legal and ethical dilemmas.

A settlement might appear to be the practical and prudent course to take when faced with a protracted due process procedure and quadruple-digit legal fees. A "deal" might include a "buy-out" (or payment) to the employee as well as dismissal of the charges. But school officials who agree to "hush-hush" deals or "buy-out" settlements with staff members charged with disciplinary offenses (e.g., child abuse) may only aggravate the serious and most say the growing problem of recurring misconduct by employees.

Settlements may promise the staff member that prospective employers will be told nothing about the alleged offense in return for an immediate resignation. Such "deals" save the school system time, expense, and unfavorable publicity, but if the charge of sexual, physical, or drug abuse is true, the employee could commit a similar offense after being hired by an unsuspecting school system.

Path of least resistance

Whether the offense triggers a legal or contractual disciplinary procedure, many school systems engage in an informal process similar to "plea bargaining." Both sides obviously benefit from an informal settlement of the charges. Accused employees no longer have to worry about the emotional and financial toll of lengthy due process hearings or what might be placed eventually in their personnel records. An employee, whether innocent or guilty, plausibly could be tempted to "settle" in order to save face.

School boards, too, benefit from the deals, particularly if the charges against the employee are difficult to prove. The prospect of forcing third parties—especially children—to testify is an uncomfortable one for many boards. Other advantages of settlement include:

- **keeping the matter out of the news. Once aired, the press usually concentrates on the incident at the expense of other school issues.**
- **bypassing the cumbersome and expensive disciplinary procedure.**

According to a 1982 report by the New York State Council of School Superintendents, disciplining a tenured teacher (during the 1980-81 school year) took approximately 357 days from the time the board brought charges until the hearing panel rendered a decision. The average cost to the school board was $40,000. Salary payments to the suspended teacher (leave with pay) added at least $18,000 to the expense sheet. There is no reason to believe these figures have decreased.

Two other factors encourage dealmaking and settlements between school boards and employees. First, neither side is certain of "winning" the case if the matter is resolved according to official procedure. Second, even a favorable decision could be appealed, thus tapping more time, money, and effort.

Legal, yes; moral, no

A disturbing provision often written into termination agreements prohibits the school system from disclosing the reasons behind the employee's departure from the district. The language might suppress information critical to a prospective employer's assessment of the applicant. While the provision is legal, school boards should weigh carefully the moral considerations of such action.

As with so many issues, anticipatory policy development can save school officials a great deal of agonizing when they are confronted with the problem. Even if an otherwise strong policy allows for settlement on a case-by-case basis, the board nevertheless assumes an assertive position when termination discussions begin.

Sample policy

The New York State School Boards Association policy services department has developed a policy that issues a strong statement to school employees: The school board will not be a party to any settlement that would forfeit its right to inform prospective employers or the State Education Department of the reason for a resignation.

To insure that no defamatory or stigmatizing—and potentially libelous—statements are made, the policy forbids a school board member or staff member (with the exception of the superintendent or a designee) to discuss publicly the situation.

The policy also requires the superintendent or designee to consult legal counsel before making such a statement in order to ensure its accuracy and relevancy. Furthermore, the policy requires school officials to report any allegations of serious misconduct to appropriate authorities. (The policy has been included in the administrator's copy of *Updating*.)

Take a stand

The adoption of this type of policy allows the school board to enter settlement negotiations on a sure footing; serves notice to employees and the community that the school system will not "sweep under the rug" allegations of employee misconduct; and protects future employers and students by ensuring full disclosure of employee records. ■

Robert Rader is director of policy and risk management services for the New York State School Boards Association.

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Sexual misconduct by teachers

Delicate and tricky for school boards to grapple with, the issue of sexual misconduct by teachers looms large on the horizon of board responsibility to ensure safe, nurturing schools.

As public employees, teachers have a legal obligation to uphold the reputation of their employers; as role models, teachers must avoid scandal in order to maintain their "fitness to teach." Because of their close contact with children, teachers are held to the highest standard of conduct in their relations with students.

Two areas of misconduct violate the stewardship entrusted to teachers: *the sexual abuse of or romantic involvement with students* and *actions that erode the ability to serve as positive role models.*

Although infrequent, such incidents do occur. The potential injury to impressionable students and to the schools' reputation can take years to mend. Boards, however, can do more than hope the worst doesn't happen. Sound policy development followed by the policy's wide dissemination in the schools and community are prevention measures. Then, if misconduct occurs, resolving the matter proceeds on a more even keel, with the board on firm ground in meting out necessary discipline.

Sexual abuse of students

"Since a single incident of inappropriate sexual conduct may provide grounds for dismissal," writes W. Richard Fossey ("Legal Aspects of Child Abuse and Public Schools," *School Law in Review 1986*) school officials can take strong action against offenders. The verification of the student's account (always be wary of false allegations by students) immediately should trigger the disciplinary process. An Illinois appeals court, for instance, upheld the dismissal of a physical education teacher who pinched several second grade girls, even though he was offered no chance to improve in accordance with statutory requirements.

Courts, in some circumstances, have held school officials responsible for a teacher's sexual conduct with students. "A school board may be liable for a sexual assault by a school employee if the school district engaged in negligent supervision" or if the act was "reasonably foreseeable," writes Fossey.

A California appeals court in 1987, for example, ruled that a school board's "care-taking" responsibility makes it potentially liable for a teacher's molestation of a five-year-old student.

In 1987 a federal district court in Missouri also allowed six students to sue the school board for not preventing alleged sexual abuse by a teacher after school officials failed to investigate reports of misconduct.

A school board, however, is less responsible for preventing a teacher's romantic involvement with a student. In *Kimpton v. School District of New Lisbon* (1987), a Wisconsin appeals court refused to find school officials liable for negligence in allowing a sexual relationship to develop. The plaintiff did not show that the district knew, or had reason to know, of the affair.

The benefits of having a policy to prohibit teachers from touching students except in case of an emergency might be outweighed by its educational disadvantages. Although such a policy relieves boards of the need to determine whether the touching was harmless or sexual, the ban also curtails positive physical contact between teachers and students (e.g., comforting and friendship).

". . . physical contact between teacher and student should be a natural ingredient of that interactive relationship," says David W. Anderson (*Contemporary Education*, Summer 1987). The poorest teaching, he adds, is "clinical and impersonal."

School boards should consider adopting a strict policy prohibition of dating or of engaging in any other social activity that is not a legitimate part of the school program.

Private lives & sexuality

School boards seeking to dismiss homosexual teachers have relied on laws or policies allowing terminations for "immorality." Courts, in turn, have reviewed some of these cases as potential violations of the teacher's Fifth and Fourteenth Amendment protections of liberty (sexuality) and property (job) against arbitrary action.

Court decisions generally have made it difficult for employees to bring successful action against school officials. Even when a teacher succeeds in showing a protected interest, the employee is entitled only to appropriate due process hearings, not necessarily reinstatement.

In another type of case, teachers—claiming a constitutional "right of privacy"—challenge policies or laws proscribing immorality. The extension of this right to private sexual conduct remains a controversial topic. The Supreme Court has upheld state laws criminalizing sodomy as being a rational way to prevent moral delinquency, but, on the other hand, has acknowledged that it has "not definitely answered the difficult question whether and to what extent the Constitution prohibits state statues regulating private consensual sexual behavior among adults . . . . " (*Carey v. Population Services*, 1987).

School board action against a teacher is on firmer ground when the offense violates a state law. Otherwise, boards must show either an adverse impact on teacher performance or public notoriety (which is not due to the actions of school officials). Usually notoriety must involve *actions* by a teacher or *speech* voicing a personal interest, rather than *speech* on homosexuality as a public issue. Public "flaunting" also strengthens the case for dismissal.

Other relevant factors:

- **when the incident occurred;**
- **whether the incident occurred in a private or public place;**
- **the age and maturity of the students assigned to the teacher;**
- **extenuating circumstances surrounding the incident;**
- **and the likely recurrence of the conduct.**

Legal protection

State laws, local ordinances, and union contracts may confer additional rights and responsibilities on both parties; consult your school attorney before policy development and board action in this area.

Due process procedures should be followed in all cases of employee discipline. These will vary according to local jurisdiction and the type of offense.

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Prior to termination, employees should receive notice and a hearing, although an evidentiary process isn't always required. ". . . an indictment may not be necessary where the charges are as egregious as child abuse" by a teacher, according to the July 1988 issue of *Inquiry & Analysis*.

The best defense . . . .

Minimizing the incidents of sexual misconduct depends on effective and thorough hiring practices, sound and well publicized policies, and prompt investigation of suspected offenses.

Give and receive full disclosure. School officials face a double-barrelled gun of responsibility in giving and getting proper employment references. When asked for a reference, a personnel director must provide enough information to avoid a "negligent referral" lawsuit but avoid publicizing unsubstantiated rumors that could result in a defamation suit by the former employee. One answer is to require an official finding of innocence or guilt before accepting an employee's resignation.

School officials, within the scope of state law, should conduct a complete background investigation of applicants, including criminal records, child abuse records, and employer references. School districts may be held liable for their failure to uncover an applicant's offenses even though the state does not require background checks.

Stumbling blocks are common—for instance, finding arrest records (when no conviction occurred) or the original charge (when the defendent plea bargains to a lesser charge). At the February 1989 meeting of the Council of School Attorneys, James Walsh advised, "Some people are wrongfully arrested, but in the majority of cases there is something to it, and so there is a risk." However, "the rules are more fuzzy" on whether employers can turn down an application solely on the basis of an arrest, he said.

Prevent misconduct with policy. Review current policies on the supervision of employees. Request that teachers leave their classroom doors open; encourage frequent classroom observation by visitors and administrators; consider team teaching options that assign two or more adults to each work station; require special supervision of teachers in relatively isolated areas of the school or grounds; and make employees fully aware of the board's conduct policy.

Immediately investigate problems. First, make sure school administrators are familiar with relevant provisions in labor contracts, state laws, and school policies. In the area of romantic involvement with students, Victor Ross [superintendent of Aurora (CO) Schools] advises administrators to immediately assess three factors: the age of the student; whether the student's story is backed up by a complaint made by an adult; and corroborating evidence. "Even if one of these three critical factors is missing [and the principal is convinced of the teacher's guilt] he or she still has an option to try the power of persuasion, the ability to bluff" the employee into resigning. (*Executive Educator*, March 1981)

In areas of teacher conduct outside of school hours (and not involving students), remember that the activity must compromise the fitness to teach or the schools' reputation. The effect of the teacher's behavior on students is relevant. ■

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